No. 05-427

IN THE

SUPREME COURT OF THE UNITED STATES

JOAN ROBERTS,
Petitioner

v.

TITUS COUNTY MEMORIAL HOSPITAL;
GEORGE BURNS, Director of Radiology,
Titus County Memorial Hospital;
GENE LOTT, Director of Human Resources,
Titus County Memorial Hospital

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR REHEARING

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65 C.R. 1044
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STATEMENT AND ARGUMENT OF THE CASE

The Defendant moved for summary judgment "pursuant to Rule 56 of the Federal Rules of Civil Procedure" claiming "there are no genuine issues as to any material fact as to the claims asserted by the Plaintiff." (Record on Appeal at 1311, hereafter ROA). Petitioner's 3rd Am. Pet. stated claims for unjustified governmental intrusion on her – and others not before the court – speech as a patient advocate, including reports of acts of health care negligence in the interest of patients, due to a facially vague and standardless or sufficiently subjective departmental policy known as Code #6; and/or as applied. (ROA at 1119-1120, 1128 -1129, 1131-1132, 1136-1137). Petitioner's 3rd Am. Pet. also stated claims for unjustified governmental intrusion on her speech in pursuit of a Texas Whistleblower Act claim, through the arbitrary enforcement of a Hospital solicitation policy with view-point discrimination. (ROA at 1128, 1143-1144). Petitioner's alternative pleading under the pretext of these two policies, pled she was terminated in retaliation for her prior reports to Hospital officials of the Hospital's violations of law relating to competitive bidding procedures in the purchase of a CAT scan machine (ROA at 1137 -1138) and previously filed reports/EEOC charges of sex discrimination (ROA at 1166-1168). Petitioner submitted her affidavit testimony of her specific speech as it relates to her claims with supportive documents. (ROA at 1542-1543, 1559-1561).

Petitioner's 3rd Am. Pet. pled that in addition to due process rights based on these federal based rights, she had a substantive due process right, for all of which she was denied procedural due process and discharged without constitutionally adequate safeguards. (ROA at 1148-1150). Petitioner brought forth the Hospital By-laws as the binding criteria she was a "for cause" employee with an enforceable expectation of continued public employment, set forth in practice through the conduit of the Board's definitively defined disciplinary standards contained in

the employee handbook (ROA at 1586, 1349) and her affidavit testimony alleging an unfair termination process. (ROA 1546-47).

In addition, Petitioner pled facts in support of a Title VII hostile work environment claim of disparate treatment because of her sex, rooted in her Director's prejudice and sex based stereotyped set of beliefs and expectations (ROA at 1153-1161), and submitted her affidavit (ROA at 1541-1565) testifying to numerous detailed accounts of disparate treatment to include stray remarks and evidence of her Director's subjective, discretionary promotion system creating a statistical disparity as it pertained to women. (ROA at 1592; App. Br. 13-19).

Petitioner stated objections in her response (ROA at 1494-1506) and at oral argument (ROA Vol. 10 at 33) to the mischaracterization (ROA at 1308-1343) of the pleadings and the failure to respond.

The issue before this Court is did the Courts below abuse their discretion in deciding this case, err as a matter of law in weighing the evidence, changing the evidence, and making credibility determinations on the disputed fact issues that go to the heart of this case, described below, causing improper judgments; and accordingly was Petitioner intentionally discriminated against and denied equal protection of the law because she is pro se.

Petitioner's Count 1 and her testimony, claim her speech and interest as a patient advocate in reporting her concerns of medical negligence are worthy of First Amendment protection, outweighing the Hospital's interest in protecting a "code of silence", because such a code does not promote the efficiency in its public services. (ROA at 1139-40, 1561). The Fifth Circuit in *Kinney v. Weaver.* No. 00-40557-CV (4-15-04) stated, "*this court* has recognized, the First Amendment interest in protecting speech about official misconduct is also a governmental interest, and there are circumstances in which that interest outweighs any other governmental interest that may be implicated. ... This case is by no means the first time that this court has recognized the existence of a 'code of silence'... enforcing such a 'code of silence' is not a legitimate interest

because it does not promote the efficiency of public services... *this court* has also recognized the great First Amendment significance of speech regarding misconduct of public officials... the dissent does not mention that the subject matter of Kinney's and Hall's speech was official misconduct, much less official misconduct as grave as... the dissent further minimized the First Amendment interest at stake in this case by characterizing it as solely Kinney's and Hall's interest... individuals working in [hospitals] 'are often in the best position to know' about the occurrence of official misconduct... 'it is essential' that individuals such as [Roberts] 'be able to speak out freely' about [physician negligence]... particularly [negligence] that is as serious as [misdiagnosing appendicitis or a pituitary tumor]... [to term Roberts' speech as misconduct] appear[s] to be employing euphemisms for a 'code of silence' prohibiting..." reports of negligence. *Kinney, Id.* at 44-48.

As in *Kinney,* both Courts minimized or ignored the claims and the First Amendment interest at stake and asserted Roberts was "providing diagnoses to patients and giving unsolicited diagnoses to doctors" and credited such disputed legal conclusions as true. (C. Pet. App. 2 at 10; App. 1 at 7). When asked in oral argument, whether Roberts talked to patients in such a manner, she unequivocally stated, "NO. NO, NO, NO. I NEVER TALK TO PATIENTS LIKE THAT, WHICH THEY SAY I DID, BUT I DIDN'T." (ROA Vol. 10 at 28). The District Court concluded Roberts' actions were equated as making diagnoses and practicing medicine (C. Pet. App. 2 at 10 -11), when she recognized and notified an emergency room attending Doctor he had received an incorrect authoritative normal report of a brain CAT scan, which became verified as incorrect the following day by an authoritative report of the patient's MRI scan (ROA at 1131;1561). In oral argument the Hospital did not dispute the facts of Roberts' conversations with the ER Doctors on June 4th and June 6th. (ROA Vol. 10 at 39; ROA 1561). The characterization of Roberts' actions is a genuine material fact issue and the Courts have committed a cognizable error of law causing reversible harm.

The District Court several times cited and stated *nonexistent* fact information in the record to support its opinion as follows: (1) Petitioner alleges the "4-9-02" letter of counsel – entitled concerning recent problems – "violated her free speech rights as a patient advocate", but the 3rd Am. Pet. named the 3-4-02 letter (C. Pet. App. 2 at 8); (2) Petitioner alleges the "3-4-02" letter of counsel "violated her free speech rights as a patient advocate" when it "ordered her to discontinue activities of diagnosing patients", but the letter stated no such warning (C. Pet. App. 2 at 8) and; (3) "alleges she was retaliated against for exercising her free speech relating to the solicitation policy, making medical diagnoses, and giving medical advice", when the Court's cited record states the exact opposite and confirms she denied the basis of such claims (C. Pet. App. 2 at 31).

The District Court also, asserted material facts as true that the record clearly disputes (ROA 1118-1180; 1479-1694) without citing to the record as follows: (1) "Plaintiff claims she has a constitutional right to diagnose and give medical advice…". (C. Pet. App. 2 at 2); (2) "Because the Court has found that Plaintiff's speech relating to the solicitation policy, making medical diagnosis and giving medical advice…". (C. Pet. App. 2 at 31); (3) "… Plaintiff claims to have in giving her opinions regarding medical advice." (C. Pet. App. 2 at 31) and; (4) "Plaintiff was soliciting employees and diagnosing patients' problems and giving them medical advice…". (C. Pet. App. 2 at 33-34). According it made a legal conclusion inferred from disputed facts not in evidence (C. Pet. App. 2 at 11). The Court also, changed the substantive form of a material document when it altered the form of Petitioner's 3-4-02 letter of counsel promulgating Code #6 as policy, when it transposed the original word "them", which in the context of the sentence related back to "physicians", with the word "patients". (C. Pet. App. 2 at 5).

Both Courts found *Southern Christian Leadership Conference v. Supreme Court of State of La.* 252 F. 3d 781, (5th Cir. 2001) controlled Count 1. That case is not on point because the policy in question did not regulate or prohibit speech directly, or implicate speech of

public concern, or punish speech, the policy was content neutral, the attack was on the enactment of the policy and not the implementation, and no forum existed, thus it was error to base this case on *Southern Christian* and cite no authority on point that employee speech about reports of cognizable medical negligence are not matters of concern.

In the Count 1 facial challenge the Defendant failed to make a showing or meet the required elements of a facial challenge to a vague policy curtailing prospective employee speech, tellingly the District Court argued the case. (ROA at 1311-1312; 1319-1325; C. Pet. App. 2 at 5-8). "[W]here a vague statue 'abut[s] upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of [those] freedoms'"; accordingly the Code #6 policy clearly abuts speech in the interest of the patient. *Grayned v. City of Rockford*, 408 U. S. 104, 110 (1972). Neither Court applied the rule of law to the Defendant's required burden to a facial challenge in the present context to "show that the interests of both potential audiences... present and future employees" engaging in speech as a patient advocate "are outweighed by that expression's necessary impact of the speech on the Hospital's actual operation". *United States v. National Treasury Employees Union*, No. 93-1170 (1995); (C. Pet. App. 2 at 5-8; App. 1 at 5-6). The Appeals Court did not apply the rule of law for *both independent* reasons a policy can be found vague in a facial challenge, it did not analyze whether the policy's lack of definitive standards encouraged arbitrary enforcement. (C. Pet. App. 1 at 5-6). Both Courts tellingly ignored the pleadings.

In the Count 1 pretext claim, the Courts found whistleblower speech was an activity protected by *law*. (C. Pet. App. 2 at 13-14; App. 1 at 7-8). The District Court referenced no authority directing the Court, commanding Petitioner's remedy for her injury as contingent upon the impossible burden of proving Defendant's pretextual conclusory charges were a matter of public concern, charges alleged to be libelous and illegitimate are genuine issues of material fact since Petitioner emphatically testified to the contrary. (App. R. Br. 5-8). (C. Pet. App. 2-31). "In pretext cases, 'the issue is whether

either illegal or legal motives, but not both were the "true" motives behind the decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 260 (1989). The Appeals Court did not address this pretext claim. (C. Pet. App. 1). Whistleblower activities are protected by law and, "If state may not interfere with or prohibit activity itself, it may not regulate discussion relating to that activity." USCA Con. Amend. 1 – *Valley Family Planning v. State of N.D.*, 489 F. Supp. 238, 243 (1980).

In the Count 2 viewpoint discrimination claim, described above, the Defendant failed to move on or negate as a matter of law the required elements in defense of the policy's implementation. (ROA at 1311-1312; 1319-1325). The District Court tellingly argued Defendant's case, exercising a power it does not possess as the *Hospital* is to "satisf[y] its ultimate burden of persuasion"... "which always remains on the moving party". *Celotex Corp. v. Catrett*, 477 U. S. 317, 331 (1986); (C. Pet. App. 2 at 15-18).

The District Court found the speech element of the alleged solicitation was of public concern, but the alleged solicitation conduct was not. (C. Pet. App. 2 at 13; App. 1 at 7). The Appeals Court agreed, but did not apply this finding to the view-point discrimination claim. (C. Pet. App. 1 at 7-8). Neither Court cited to any authority governing liability for the implementation of a policy directing speech and non-speech elements combined in the same course of conduct in a non-public forum; accordingly the Courts judgment was arbitrary, and unprincipled. (C. App. 2 at 15-18).

The District Court cited and stated a *nonexistent* fact in the record to support its opinion as follows: Petitioner "alleges the Defendants' policy regarding solicitation violated her freedom of speech"; however, the 3rd Amended Petition alleged the policies implementation, not the policy. (C. Pet. App. 2 at 12; ROA 1143-44). Then it asserted a legal conclusion of a material element as true that is in dispute and did not cite to the record as follows: "In prohibiting Plaintiff's solicitation activities, however, Defendants acted to preserve the purpose of the Hospital's business in treating patients." (C. Pet. App. 2 at 17). The Courts further failed

to recognize the 4-9-02 solicitation letter did not state the activity was disruptive to the *business of treating patients*. (App. Br. 46-47).

In the Count 3 due process claim, the District Court found the Hospital Administrator fired Petitioner (ROA Vol. 10 at 10; ROA at 1349) while the Appeals Court contradicted the District Court and stated he did "not" (Cert. Pet. App. 1 at 5), as a basis to support the judgment in favor of the Hospital's rebuttal argument that the Hospital By-laws directing the Administrator to only "dismiss any employee for good cause" (ROA at 1586), accordingly could "not even apply to her employment termination". (Br. of App. at 18).

Neither Court cited authorities based on rights grounded in a local By-law, but instead based their decision only on cases governing "policies" or "contracts". (Cert. Pet. App. 1 at 3-5; App. 2 at 18-23). To approach a case in this manner is to ignore the Supreme Court, "[j]udicial decisions do not stand as binding 'precedent' for points that were not raised, not argued and hence not analyzed." *Legal Services Corp. v. Velazquez, et. al.*, U.S. No. 99-603 (Feb. 2001) (App. Br. at 25). The District Court determined that a By-law must be "reference[d] ... in an employment contract" and cited no authority on point with this arbitrary conclusion. (Cert. Pet. App. 2 at 22).

The Court of Appeals as directed by *Bishop v. Wood*, 426 U.S. 341, 344-47 (1976) determined "we look to state law" and cited Texas cases "imposing a strong presumption in favor of at-will employment"; however, the Court ignored state law, in Texas, "if a general provision conflicts with a special or local provision..., the special or local provision prevails as an exception to the general provision, unless the general provision is the latter enactment...". Tex. Gov't. Code §311.026(a)(b). (App. Mot. Reh. at 5). It is not *reasonable* to determine a By-law is equated in weight with a policy. Nor is a By-law an "ambiguous employment polic[y]". (Cert. Pet. App. 1 at 4). It is only rational according to Texas law to conclude that a By-law can be the basis of a legitimate claim that is more than a unilateral expectation of due process rights and constitutes evidence as a matter of law in the absence of other documentary

or authoritative evidence to the contrary (ROA at 1308-1409). The procedural due process claims are undisputed that she was denied a fair and impartial hearing, specific information of the charges and no post appeal process was available. (ROA at 1308-1409).

In Count 4, both Courts erred in analyzing Petitioner's Title VII hostile work environment claim as stated in her 3rd Amended Petition, detailed above, solely as a failure to promote claim. (C. Pet. App. 2 at 23-29; App. 1 at 9). Both Courts stated, "Title VII addresses only 'ultimate employment decisions'" and accordingly Petitioner's claim must fail; thus they ignored *Green v. Administrators of the Tulane Ed. Fund*, 284 F. 3d 642 (5th.Cir. 2002) recognizing a hostile work environment can be tangible without economic harm. (C. Pet. App. 1 at 9; App 2 at 25). The Appeals Court found Roberts had "a mixed record for interpersonal relationships" (C. Pet. App. 1 at 2), but tellingly turned around and found it a "valid nondiscriminatory reason" negating discrimination. (C. Pet. App. 1 at 9).

In Count 5, the Appeals Court tellingly found there was a "dearth of evidence demonstrating any sort of pretext" to justify a claim for Title VII retaliation. (C. Pet. App. 1 at 10). Petitioner's response record consisted of 215 pg. disputing the reasons in the 6-14-02 letter as untrue and not legitimate, creating material fact issues (ROA 1479-1694). The District Court found 6 months between the EEOC claim of 12-18-01 and firing of 6-14-02 was to long to support an inference of intent (C. Pet. App. 2 at 33). The Courts ignored the record shows documentary evidence of adverse counsels dated 1-8-02, 3-4-02, two dated 4-9-02 and letters from alleged co-conspirators dated 4-1-01 & 3-7-02 that are subjects of a libel suit recently remanded for trial, are more than a dearth. (ROA 1573, 1595-97, 1622, 1623, 1615-16, 1601); *Roberts v. Davis*, No. 06-04-0057 CV, Tex. App. - Texarkana (March 15, 2005) Pet. D., Mot. Reh. D.

The District Court asserted material fact issues as true that are in dispute (ROA 1118-1180; 1479-1694) without citation to the record to substantiate their opinion, as follows: (1) "Plaintiff nevertheless was terminated on June 14, 2002, for refusing to follow her employer's

instructions...". (C. Pet. App. 2 at 33) and; (2) "Plaintiff's termination was based on her failure to follow the orders of her employer." (C. Pet. App. 2 at 34). The 6-14-02 letter testifies differently. (ROA 1587, App. R. Br. 24).

The numerous errors of law and abuses in discretion are valid and caused reversible harm which any unbiased Court could pick out. "Courts are constitutionally founded, independent, and impartial adjudicative tribunals constituted to hold and exercise judicial power which emanates directly from the Constitution." *Galbraith v. Lenape Regional High School Dist.*, 964 F. Supp. 889, 894 (D.N.J. 1997). "The Supreme Court has warned that at summary judgment, '[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge...' *Anderson v. Liberty Lobby, Inc.* 477 US. 242, 255 (1986)." *Berry v. Baca*, No. 03-56000, 9th Cir. (2004).

The 5th Cir. in *Kinney* turned for the plaintiff, a case with the same similarities as briefed above, except it was not a pro se case, has 4 counts, and consist of 66 pgs. (appox. 27 lines per pg.), whereas this case has 5 counts & 4 alternative pleadings, is pro se, and consist of 10 pgs. (appox. 24 lines per pg.). *Kinney, Id.* In *Hopson v. Quitman County*, No. 96-60582, 5th Cir. (1997) a case alleging termination in violation of the Family & Medical Leave Act and a Hospital policy, for which District Court Judge Folsom sitting by designation from the Eastern District of Texas, wrote the opinion, who was the same Judge as in this case at bar. The *Hopson*, opinion consist of 241 lines of text and the case at bar 224 lines, the summary judgment was reversed because the Court found "whether Hopson was insubordinate and failed to report to work... are genuine issues of material fact" as well as "whether *Hopson* made a reasonable effort... not to disrupt unduly the operations of the hospital." *Hopson , Id.* The case at bar alleged libel, retaliation upon retaliation and discrimination. (3rd Am. Pet.) The Courts decision does not conform to the precedent, "[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in

his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

Petitioner has not seen an "impartial judiciary" and any person of reasonable intelligence could infer from the record that it is because she is pro se. The fact those cases were published and this case is not, also supports this inference. "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor deny to any person within its jurisdiction the equal protection of the laws." U.S.C.A. Art. XIV. The abridgment of Roberts' equal protection under the law as a pro se litigant is intentional as the Courts contradictions are a denial of facts they already knew, consider those above and below.

"Plaintiff's claim of violation of her right to free speech under Count 1 and 2 of the Third Amended Petition fails as Plaintiff's speech was a matter of personal opinion and benefit, not a matter of public concern" (Cert. Pet. App. 2 at 35), but concluded, "[t]he Court recognizes that Plaintiff had in mind the best interest of her patients and the Hospital when she attempted to assist patients and doctors... and when she filed her Whistleblower lawsuit." (Cert. Pet. App. 2 at 34). The Court also stated, "Accordingly, the Court finds that based on the *content form and context of statements provided by plaintiff* in pursuit of a Texas Whistleblower Act claim, ... Thus, Plaintiff's statements in pursuit of her Texas Whistleblower Act claim *can be* fairly considered as relating to matters of... concern to the community." (Cert. Pet. App. 2 at 13). (emp. added). Yet, the Court found in its conclusion, "Plaintiff failed to identify specific "speech" which she believes was protected." (C. Pet. App. 2 at 35).

The Court should use its impartial discretion and reverse.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, JOAN ROBERTS, do swear or declare that on this date, DECEMBER 2, 2005, that Petitioner's Motion For Rehearing is presented in good faith and not for reasons of delay.

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